

Rule 19, Ariz. R. Crim. P.

Former crime lab employees are not entitled to payment for their factual testimony.

There is no legal or policy basis for paying expert witness fees to former crime lab employees who testify as fact witnesses.

There is no legal basis for former crime lab employees who have gone into private practice to demand expert witness fees when they are subpoenaed to testify as fact witnesses in cases on which they worked while still employed by the crime lab. Moreover, both public policy and trial strategy dictate against such payments.

1. Statutes

A.R.S. § 13-4071 provides that “The process by which attendance of a witness before a court or magistrate is required is a subpoena.” A.R.S. § 13-4071(A). The subpoena may be signed by “the county attorney, attorney general, municipal prosecutor or city prosecutor for witnesses to appear before the grand jury, or for witnesses on a complaint, indictment or information to appear before the court in which the complaint, indictment or information is to be heard or tried ... “ A.R.S. § 13-4071(B)(2).

A witness who disobeys a subpoena or who refuses to be sworn or testify as a witness faces contempt. A.R.S. § 13-4073(A). A witness is entitled to receive “a reasonable amount for travel expenses” if that witness lives out of county or if the witness is indigent and unable to pay for his or her own travel expenses. A.R.S. § 13-4077(A).

Nothing in A.R.S. Chapter Thirteen, Title Twenty-One (A.R.S. §§ 13-13-4071 through 13-4077; Attendance of Witnesses) provides for payment of

witnesses whose attendance is secured through subpoena in any other circumstance.

2. Case law

Apparently no Arizona cases specifically address the question at issue here. But federal case law recognizes a “strong public policy against payments to fact witnesses.” *Fund of Funds, Ltd, v. Arthur Andersen & Co.*, 545 F. Supp. 1314, 1370 (S.D.N.Y. 1982), *citing Hamilton v. General Motors Corporation*, 490 F.2d 223, 227-28 (7th Cir. 1973). While not necessarily indicative of wrongdoing, such payments can and in fact should be brought to the attention of the jury, and counsel may comment on the the possible influence of payments on a witness’ credibility. 545 F. Supp. at 1370.

In *Hamilton, supra*, the United States Court of Appeals for the Seventh Circuit held that a witness who testified to matters of his own personal knowledge, and thus did not qualify as an expert witness, was not entitled to compensation apart from reasonable travel costs and the reasonable value of lost time. *Hamilton v. General Motors Corporation*, 490 F.2d 223, 229 (7th Cir. 1973). Such a witness is not entitled to additional compensation because of public policy considerations first recognized in the common law. *Id.* at 227-28. Those considerations include the notion that as a citizen, the witness has the duty to testify in court regarding facts known to him without compensation by a party. *Id.* at 228.

See also 81 Am.Jur.2d Witnesses § 69 (2002) (“A special contract to pay an ordinary witness amenable to process more than the regular fee is

unenforceable for want of consideration, because the performance of a legal duty is not a sufficient consideration to support a promise. Moreover, because the contract offers enticement for perjury and tends thereby to pervert the course of justice, it is contrary to public policy and void.”)

While a particular witness may argue that failure to provide compensation is unduly burdensome, that argument has been considered and rejected. See *Irons v. Karceski*, 74 F.3d 1262, 1264 (D.C. Cir. 1996) (failure to pay a fact witness more than the statutory fee of forty dollars per day is not an undue burden which would warrant the quashing of a subpoena.)

3. Conclusion

There is no statutory basis for a former crime lab employee to demand payment as an expert witness for testimony relating to matters on which he or she worked while still employed by the crime lab. Such witnesses are fact witnesses, and as such, are not entitled to payment for their testimony. Public policy dictates against such payments because as a citizen, the witness is required to provide testimony if subpoenaed to do so. Additionally, because any fee paid to the witness for his or her testimony would reflect negatively on the credibility of the witness, such payments would provide the defense with a weapon with which to impeach the witness.

In short, payment of fact witnesses is neither required nor recommended.